

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

PATRICIA WEBB,  
vs.  
CAROLYN W. COLVIN,<sup>1</sup>

Case No. 2:12-cv-00592-GMN-PAL

## **REPORT OF FINDINGS AND RECOMMENDATION**

(Mtn to Reverse - Dkt. #24)  
(Mtn to Affirm - Dkt. #27)

This case involves judicial review of administrative action by the Commissioner of Social Security denying Plaintiff Patricia Webb’s claim for disability benefits under Title II of the Social Security Act (the “Act”).

## BACKGROUND

On May 8, 2008, Plaintiff filed her application for disability benefits, alleging she became disabled on May 1, 2009. AR<sup>2</sup> 164-169. The Social Security Administration (“SSA”) denied Plaintiff’s application initially and on reconsideration. AR 72-76, 81-83. A hearing before an administrative law judge (“ALJ”) was held on September 2, 2010. AR 35-69. In a decision dated January 25, 2011, the ALJ found Plaintiff was not disabled. AR 18-34. Plaintiff requested review of the ALJ’s decision by the Appeals Council. AR 14-17. The ALJ’s decision became the Commissioner’s final decision when the Appeals Counsel denied review on February 8, 2012. AR 4-9.

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<sup>1</sup>Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration on February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, she is substituted for Michael J. Astrue as the Defendant in this matter.

<sup>2</sup>AR refers to the Administrative Record, which was delivered to the undersigned upon the Commissioner's filing of her Answer (Dkt. #21) on February 5, 2013.

On April 11, 2012, Plaintiff filed an Application to Proceed In Forma Pauperis (Dkt. #1) and submitted a Complaint (Dkt. #8) in federal court, seeking judicial review of the Commissioner's decision pursuant to 42 U.S.C. § 405(g). The Commissioner filed her Answer (Dkt. #21) on February 5, 2013. Plaintiff filed a Motion for Remand (Dkt. #24) on March 7, 2013. The Commissioner filed a Motion to Affirm and Opposition (Dkt. #27) on April 22, 2013. The court has considered the Motion to Remand and the Opposition and Cross-Motion.

## **DISCUSSION**

## **I. Judicial Review of Disability Determination**

District courts review administrative decisions in social security benefits cases under 42 U.S.C. § 405(g). *See Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). The statute provides that after the Commissioner of Social Security has held a hearing and rendered a final decision, a disability claimant may seek review of the Commissioner’s decision by filing a civil lawsuit in federal district court in the judicial district where the disability claimant lives. *See* 42 U.S.C. § 405(g). That statute also provides that the District Court may enter, “upon the pleadings and transcripts of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.” The Ninth Circuit reviews a decision of a District Court affirming, modifying, or reversing a decision of the Commissioner *de novo*. *Batson v. Commissioner*, 359 F.3d 1190, 1193 (9th Cir. 2003).

The Commissioner's findings of fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g); *see also Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005). However, the Commissioner's findings may be set aside if they are based on legal error or not supported by substantial evidence. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006); *see also Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). The Ninth Circuit defines substantial evidence as "more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995); *see also Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n. 1 (9th Cir. 2005). In determining whether the Commissioner's findings are supported by substantial evidence, the court "must review the administrative record as a whole, weighing both the evidence that supports and the evidence that

1 detracts from the Commissioner's conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998);  
 2 *see also Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996).

3 Under the substantial evidence test, the Commissioner's findings must be upheld if supported by  
 4 inferences reasonably drawn from the record. *Batson*, 359 F.3d at 1193. When the evidence will  
 5 support more than one rational interpretation, the court must defer to the Commissioner's interpretation.  
 6 *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005); *see also Flaten v. Sec'y of Health and Human*  
 7 *Serv.*, 44 F.3d 1453, 1457 (9th Cir. 1995). Consequently, the issue before the court is not whether the  
 8 Commissioner could reasonably have reached a different conclusion, but whether the final decision is  
 9 supported by substantial evidence.

10 It is incumbent on the ALJ to make specific findings so that the court does not speculate as to  
 11 the basis of the findings when determining if the Commissioner's decision is supported by substantial  
 12 evidence. Mere cursory findings of fact without explicit statements as to what portions of the evidence  
 13 were accepted or rejected are not sufficient. *Lewin v. Schweiker*, 654 F.2d 631, 634 (9th Cir. 1981).  
 14 The ALJ's findings "should be as comprehensive and analytical as feasible, and where appropriate,  
 15 should include a statement of subordinate factual foundations on which the ultimate factual conclusions  
 16 are based." *Id.*

17 **II. Disability Evaluation Process**

18 The claimant has the initial burden of proving disability. *Roberts v. Shalala*, 66 F.3d 179, 182  
 19 (9th Cir 1995), *cert. denied*, 517 U.S. 1122 (1996). To meet this burden, a claimant must demonstrate  
 20 an "inability to engage in any substantial gainful activity by reason of any medically determinable  
 21 physical or mental impairment which can be expected . . . to last for a continuous period of not less than  
 22 12 months." 42 U.S.C. § 423(d)(1)(A). The claimant must provide "specific medical evidence" to  
 23 support his or her claim of disability. If a claimant establishes an inability to perform his or her prior  
 24 work, the burden shifts to the Commissioner to show that the claimant can perform other substantial  
 25 gainful work that exists in the national economy. *Batson*, 157 F.3d at 721.

26 The ALJ follows a five-step sequential evaluation process in determining whether an individual  
 27 is disabled. *See* 20 C.F.R. § 416.920; *see also Bowen v. Yuckert*, 482 U.S. 137, 140 (1987). If at any  
 28 step, the ALJ makes a finding of disability or non-disability, no further evaluation is required. *See* 20

1 C.F.R. §§ 404.1520(a)(4) and 416.920(a)(4); *see also Barnhart v. Thomas*, 540 U.S. 20, 24 (2003). The  
 2 first step requires the ALJ to determine whether the individual is currently engaging in substantial  
 3 gainful activity (“SGA”). *See* 20 C.F.R. §§ 404.1520(b) and 416.920(b). SGA is defined as work  
 4 activity that is both substantial and gainful; it involves doing significant physical or mental activities,  
 5 usually for pay or profit. *See* 20 C.F.R. §§ 404.1572(a)-(b) and 416.972(a)-(b). If the individual is  
 6 currently engaging in SGA, then a finding of not disabled is made. If the individual is not engaging in  
 7 SGA, then the analysis proceeds to the second step.

8 The second step addresses whether the individual has a medically-determinable impairment that  
 9 is severe or a combination of impairments that significantly limits him or her from performing basic  
 10 work activities. *See* 20 C.F.R. §§ 404.1520(c) and 416.920(c). An impairment or combination of  
 11 impairments is not severe when medical and other evidence establish only a slight abnormality or a  
 12 combination of slight abnormalities that would have no more than a minimal effect on the individual’s  
 13 ability to work. *See* 20 C.F.R. §§ 404.1521 and 416.921; Social Security Rulings (“SSRs”) 85-28, 96-  
 14 3p, and 96-4p.<sup>3</sup> If the individual does not have a severe medically-determinable impairment or  
 15 combination of impairments, then a finding of not disabled is made. If the individual has a severe  
 16 medically-determinable impairment or combination of impairments, then the analysis proceeds to the  
 17 third step.

18 Step three requires the ALJ to determine whether the individual’s impairments or combination  
 19 of impairments meet or medically equal the criteria of an impairment listed in 20 C.F.R. Part 404,  
 20 Subpart P, Appendix 1. *See* 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, and  
 21 416.926. If the individual’s impairment or combination of impairments meet or equal the criteria of a  
 22 listing and meet the duration requirement (20 C.F.R. §§ 404.1509 and 416.909), then a finding of  
 23 disabled is made. *See* 20 C.F.R. §§ 404.1520(h) and 416.920(h). If the individual’s impairment or  
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 26 <sup>3</sup> SSRs are the SSA’s official interpretations of the Act and its regulations. *See Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1224 (9th Cir. 2009); *see also* 20 C.F.R. § 402.35(b)(1). They are  
 27 entitled to some deference as long as they are consistent with the Act and regulations. *See Bray*, 554 F.3d at 1223 (finding ALJ erred in disregarding SSR 82-41).

1 combination of impairments does not meet or equal the criteria of a listing or meet the duration  
2 requirement, then the analysis proceeds to the next step.

3 Before considering step four of the sequential evaluation process, the ALJ must first determine  
4 the individual's residual functional capacity ("RFC"). *See* 20 C.F.R. §§ 404.1520(e) and 416.920(e).  
5 RFC is a function-by-function assessment of the individual's ability to do physical and mental work-  
6 related activities on a sustained basis despite limitations from impairments. *See* SSR 96-8p. In making  
7 this finding, the ALJ must consider all the relevant evidence such as symptoms and the extent to which  
8 they can reasonably be accepted as consistent with the objective medical evidence and other evidence.  
9 *See* 20 C.F.R. §§ 404.1529 and 416.929; SSRs 96-4p and 96-7p. To the extent that statements about  
10 the intensity, persistence, or functionally limiting effects of pain or other symptoms are not  
11 substantiated by objective medical evidence, the ALJ must make a finding on the credibility of the  
12 individual's statements based on a consideration of the entire case record. The ALJ must also consider  
13 opinion evidence in accordance with the requirements of 20 C.F.R. §§ 404.1527 and 416.927 and SSRs  
14 96-2p, 96-5p, 96-6p, and 06-3p.

15 The fourth step requires the ALJ to determine whether the individual has the RFC to perform his  
16 past relevant work ("PRW"). *See* 20 C.F.R. §§ 404.1520(f) and 416.920(f). PRW means work  
17 performed either as the individual actually performed it or as it is generally performed in the national  
18 economy within the last fifteen years or fifteen years prior to the date that disability must be established.  
19 In addition, the work must have lasted long enough for the individual to learn the job and to perform it  
20 as SGA. *See* 20 C.F.R. §§ 404.1560(b), 404.1565, 416.960(b), and 416.965. If the individual has the  
21 RFC to perform his past work, then a finding of not disabled is made. If the individual is unable to  
22 perform any PRW or does not have any PRW, then the analysis proceeds to the fifth and final step.

23 Step five requires the ALJ to determine whether the individual is able to do any other work  
24 considering his residual functional capacity, age, education, and work experience. 20 C.F.R.  
25 §§ 404.1520(g) and 416.920(g). If he or she can do other work, then a finding of not disabled is made.  
26 Although the individual generally continues to have the burden of proving disability at this step, a  
27 limited burden of going forward with the evidence shifts to the Commissioner. The Commissioner is  
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1 responsible for providing evidence that demonstrates that other work exists in significant numbers in  
2 the national economy that the individual can do. *Yuckert*, 482 U.S. at 141-42.

3 **II. Factual Background.**

4 **A. Testimony at Administrative Hearing.**

5 An administrative hearing was held on September 2, 2010, before ALJ Craig Ellis, in Las  
6 Vegas, Nevada. AR 37. At the time of the hearing, Plaintiff was thirty-seven years old, married, and  
7 she lived with her husband and her two-year old daughter. AR 39-40. Plaintiff's ten year old step-  
8 daughter resided with Plaintiff and her family on weekends. AR 40, 41. Plaintiff's husband is  
9 employed as a bellman at the Hard Rock Hotel & Casino, and Plaintiff has health insurance through her  
10 husband's employer. AR 40-41.

11 Plaintiff completed high school and approximately three years of college, but she had to quit  
12 school because of her arthritis. AR 41, 51. She testified she was 5'9" tall and weighed 255 pounds.  
13 AR 41. Plaintiff was last employed at Las Vegas Day School as a teacher's aide in the pre-kindergarten  
14 classroom. AR 42-43. She did that job for five years, ending in May 2008, when she left for maternity  
15 leave. AR 43-44. Plaintiff testified she did not return for the new school year after her maternity leave  
16 ended because her arthritis flared up after she gave birth on June 2, 2008. AR 44.

17 Plaintiff testified that she traveled out of state to go to her parents' house when she was ill. AR  
18 45-46. She said her parents either come to Las Vegas, or pick her up and drive her to their home in  
19 Covina, California. AR 45. Plaintiff estimated that between June 2008 and September 2012, her  
20 parents had taken care of her at least once every other month. AR 48.

21 Plaintiff described her emotional health as "not well." AR 49. She testified that she was very  
22 sensitive and cried easily and on a daily basis. AR 50, 51. She testified could not remember things that  
23 were not written down, and she was forgetful. AR 50. She could not sit still or sleep because of her  
24 pain. *Id.* Plaintiff was not sure whether or not she was depressed, and she was not taking any  
25 medication for depression. *Id.* She also testified that none of her doctors had discussed taking an  
26 antidepressant or seeking counseling. AR 51. She testified that she has trouble writing for long periods  
27 of time and cannot hold a hard back book to read because they are too heavy. AR 52. She stated she  
28 could not walk comfortably for long distances without sitting down to rest. AR 52-53. She testified

1 that she has trouble walking down stairs, and she falls. AR 53. She and her family had to move houses  
 2 because she fell too frequently in their two-story home. *Id.* She testified that she constantly drops  
 3 dishes due to a lack of sensation in her fingers to hold things. AR 53. Plaintiff testified that she was  
 4 prescribed wrist braces years prior. AR 54. She also uses a wheelchair when she has to go places for a  
 5 long time. AR 54-55.

6 Plaintiff testified she has pain and swelling in her hands, back, hips, toes, neck, and wrists. AR  
 7 55. Plaintiff takes a variety of medication, and she suffers from the following side effects: hair loss, dry  
 8 skin, diarrhea, vomiting, upset stomach, and lack of sleep. AR 55-57. She also testified that she has  
 9 gained approximately one hundred pounds due to her medication, and her medication caused rashes and  
 10 frequent urination. AR 57.

11 She testified that her husband completed the household chores, and she had no regular social  
 12 activities at night. AR 58. Her husband helps her to bathe and dress. AR 59.

13 Plaintiff's mother, Patricia Grecalvo,<sup>4</sup> testified that she and her husband have helped Plaintiff  
 14 during her arthritis flare ups by coming to stay with her or picking her up and taking her home to  
 15 California with them. AR 63. Ms. Grecalvo estimated that on a monthly or bimonthly basis, she and  
 16 her husband spent four or five days taking care of Plaintiff. AR 63-64. Her mother, a licensed  
 17 counselor, testified that she believed Plaintiff was clinically depressed, and Plaintiff would benefit from  
 18 antidepressant medication. AR 64.

19 **B. Plaintiff's Medical Records.**

20 **1. Dr. Steven E. Goldstein's Evaluation.**

21 Plaintiff was evaluated by Dr. Steven E. Goldstein, Ed.D., on August 28, 2008, for an extended  
 22 mental status examination. AR 385. She reported having gained one hundred pounds of "water weight"  
 23 in two years. *Id.* She reported being unable to walk long distances or for long periods of time and  
 24 having to drop out of college because of cramps in her legs when she sits for long periods of time. AR  
 25 386. She told Dr. Goldstein she had been diagnosed with rheumatoid arthritis and fibromyalgia in  
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27 <sup>4</sup>It appears that Plaintiff's mother's name was phonetically spelled in the hearing transcript, and it  
 28 is properly spelled as "Grijalva."

1 February 1997. *Id.* She indicated that she did not take any mental health medications at the time of the  
 2 evaluation, but she was taking Ambien to sleep and Vicodan or Percoset for pain. AR 386.

3 She reported that on an average day, she woke between 7 and 8 am and changes her baby's  
 4 diaper and feeds her. AR 390. She lets the dogs out and in. *Id.* She fixes herself breakfast, puts her  
 5 baby down for a nap, and takes her medication. *Id.* She takes a shower and gets dressed. *Id.* She does  
 6 one chore per day—dishes, laundry, or the like—after taking her pain medication, and she goes to bed  
 7 early. *Id.* She clarified that she only takes care of the baby twice per week. *Id.* She can only prepare  
 8 simple meals like sandwiches or cereal. *Id.* She washes the laundry. *Id.* Her husband cooks and does  
 9 the heavy cleaning. *Id.* She has two friends she speaks with "once in a while," and she last saw them  
 10 two months before the appointment with Dr. Goldstein. *Id.*

11 Dr. Goldstein opined that based on Plaintiff's intellectual abilities, she would be able to  
 12 understand, remember, and carry out complex instructions, as well as uncomplicated, and two-step  
 13 instructions with no difficulties. AR 391. She would also be able to maintain appropriate behavior  
 14 with supervisors, the public, and her co-workers. *Id.* Dr. Goldstein found that Plaintiff's psychological  
 15 prognosis would depend on the medical care "she perceives she is receiving." *Id.* He recommended  
 16 Plaintiff be referred to a psychiatrist or psychologist for mental health care. *Id.*

17 **2. Dr Alan Berman's Evaluation.**

18 Plaintiff underwent a disability evaluation on October 3, 2008, by Dr. Alan Berman, a medical  
 19 doctor certified by the American Board of Physical Medicine and Rehabilitation. AR 404, 405. Dr.  
 20 Berman observed Plaintiff was "in no apparent distress" during the examination. AR 404. He found no  
 21 evidence of any active tenosynovitis or chronic synovial thickening. *Id.* He measured Plaintiff's range  
 22 of motion and found it was normal in all joints and all planes, except she was limited to fifty degrees  
 23 forward spinal flexion and seventy degrees hip flexion. *Id.* He found no joint adhesions or effusions.  
 24 *Id.* He found that Plaintiff did not have the features of fibromyalgia on examination. *Id.* He opined it  
 25 would be difficult for Plaintiff to do strenuous work, but she could perform sedentary work. *Id.*

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1                   **3.       Dr. Christianne M. Yung, M.D.'s Treatment Notes.**

2                   Dr. Yung began treating Plaintiff in 2004 for rheumatoid arthritis and fibromyalgia-related  
3 problems. *See generally* AR 480-743. Plaintiff saw Dr. Yung on essentially a monthly basis. *Id.*

4                   Based upon Dr. Yung's treatment notes, Plaintiff suffered rheumatoid arthritis flares on  
5 December 9, 2008, June 22, 2009, August 21, 2009, December 11, 2009, February 2, 2010, August 27,  
6 2010; September 27, 2010; October 19, 2010, November 15, 2010, December 23, 2010, February 14,  
7 2011, July 7, 2011, and August 5, 2011. AR 480, 514, 521 536, 548, 650, 657, 664, 671, 688, 701, 729,  
8 739. Physical examination showed no degenerative joint changes, and tenderness in the following areas:  
9 lateral epicondyle, occiput, trapezium, lower cervical, second rib, supraspinatus, gluteal, greater  
10 trochanter, and medical fat pad proximal to the knees. AR 517, 524, 539, 552, 654, 661, 668, 675, 692,  
11 705, 733, 743.

12                   Dr. Yung observed Plaintiff's rheumatoid arthritis was improved on February 18, 2009, March  
13 26, 2009, April 22, 2009, May 20, 2009, September 29, 2009, January 5, 2010, March 2, 2010,  
14 December 13, 2010, January 10, 2011, March 11, 2011, and May 10, 2011. AR 487, 494, 500, 507,  
15 533, 546, 558, 573, 682, 698, 712, 719. Plaintiff reported her morning stiffness was better, she had less  
16 joint pain, and she was not suffering from sleep disturbances. AR 487, 494, 500, 507, 527, 542, 554,  
17 569, 678, 694, 708, 715. On physical examination, Plaintiff had no degenerative joint changes, no  
18 tenderness in the fibrocystic points, mild tenderness at Plaintiff's wrists, elbows, shoulders, hips, knees,  
19 ankles, and feet, and muscle spasm in the lumbar region. AR 491, 494, 503, 510. In April 9, 2010,  
20 May 5, 2010, June 6, 2011, Plaintiff saw Dr. Yung. AR 575, 582, 722. Physical examination showed  
21 no degenerative joint changes, and tenderness in the following areas: lateral epicondyle, occiput,  
22 trapezium, lower cervical, second rib, supraspinatus, gluteal, greater trochanter, and medical fat pad  
23 proximal to the knees. AR 579, 586, 726. Dr. Yung's impression was Plaintiff's rheumatoid arthritis  
24 was mild/stable. AR 579, 586, 726.

25                   On June 1, 2010, July 1, 2010, Plaintiff saw Dr. Yung, and although she still complained of  
26 morning stiffness and joint pain, acknowledged she was feeling better with a higher dose of Imuran. AR  
27 596, 603. Physical examination still showed some tenderness in Plaintiff's joints and fibrocystic points,  
28 but Dr. Yung's impression was that Plaintiff's rheumatoid arthritis was improved but not completely

1 controlled. AR 599-600, 606-07. On July 30, 2010, Plaintiff reported to Dr. Yung she was feeling  
2 "great" although she still had morning stiffness and joint pain in her hands. AR 610. On physical  
3 examination, she had no degenerative joint changes, some tenderness in the fibrocystic points and  
4 joints, and muscle spasm. AR 614. Dr. Yung's impression was that Plaintiff's rheumatoid arthritis was  
5 improved. AR 614.

6 Dr. Yung drafted a letter dated August 25, 2010, stating that Plaintiff had been her patient since  
7 2004 and was diagnosed with rheumatoid arthritis and fibromyalgia. AR 618. Dr. Yung wrote that over  
8 the years she had seen Plaintiff, "Ms. Webb has experienced frequent episodes of joint flares and  
9 reports she is unable to work due to pain." AR 618.

10 **4. Harmony Healthcare.**

11 Plaintiff was referred to Harmony Health Care on September 15, 2010, for a psychiatric  
12 evaluation. AR 632. She reported her chief complaints were depressive symptoms. AR 631. She was  
13 prescribed Prozac and Cymbalta. AR 633. Plaintiff also attended a therapy session on October 25,  
14 2010. AR 634.

15 **5. Dr. Paglini's & Dr. Yao's Psychological Evaluation.**

16 Drs. John Paglini, Psy.D., and Richard Yao, Ph.D, psychologically evaluated Plaintiff on  
17 November 12, 2010, for the Bureau of Disability Adjudication. AR 620. Dr. Yao, a post-doctoral  
18 intern working with Dr. Paglini, conducted the evaluation and observed Plaintiff had a high level of  
19 depressive symptomatology. AR 621. Plaintiff told him she was taking the depression medication  
20 Cymbalta and had started therapy with Dr. Stanton. *Id.* She rated her depression a nine on a scale of  
21 one to ten. *Id.* Plaintiff's MMPI-2 scores suggested the possibility of symptom exaggeration, a plea for  
22 help, or a high level of psychological distress. AR 624. Additionally, her scores suggested she converts  
23 psychological stress into physical symptoms. *Id.* Dr. Yao found Plaintiff was preoccupied with her  
24 somatic symptoms, including chronic pain, and her physical symptoms tend to exacerbate during times  
25 of stress. *Id.* He observed that Plaintiff likely preferred medical explanations for her symptoms  
26 because she lacked insight into the psychological factors underlying them. *Id.*

27 In sum, Dr. Yao found Plaintiff had no limitation understanding and remembering simple  
28 instructions, carrying out simple instructions, or making judgments on simple work-related decisions.

1 AR 627. He found Plaintiff was mildly impaired in understanding and remembering complex  
2 instructions, carrying out complex instructions, and making judgments on complex work-related  
3 decisions. *Id.* He found she was not limited in her ability to interact with co-workers or the public, but  
4 would be mildly limited in interacting with her supervisors and responding to usual work situations and  
5 changes in a work routine. AR 628.

6 **6. Southwest Medical Associates.**

7 On March 3, 2009, Plaintiff saw Dr. Gregory Middleton at Southwest Medical Associates for  
8 her arthritis and fibromyalgia. AR 821. She told Dr. Middleton she exercises approximately three  
9 times per week on a “gazelle” machine and walks regularly. *Id.* On physical examination, Dr.  
10 Middleton observed mild inflammatory arthritis in both wrists but saw no other evidence of  
11 inflammatory arthritis. AR 822.

12 Plaintiff saw Dr. Middleton again on April 24, 2009, and he found “[n]o evidence of any  
13 inflammatory arthritis is present.” AR 812.

14 In August 2009, Dr. Middleton noted that Plaintiff changed her medication without calling to  
15 discuss it with him. AR 792. He found that “presently there are no physical findings suggesting active  
16 rheumatoid arthritis.” AR 792. He believed her symptoms were caused by fibromyalgia, and he  
17 recommended consistent aerobic exercise to relieve her symptoms. AR 792. He did not believe  
18 stronger narcotics would provide Plaintiff with long-term benefits. AR 792.

19 In November 2009, Plaintiff saw Dr. Middleton. AR 778. He opined that her rheumatoid  
20 arthritis was stable and controlled, and Plaintiff’s pain was actually caused by fibromyalgia. AR 778.

21 On March 10, 2010, Plaintiff went to SMA for the first time since November 2009. AR 774.  
22 The treatment notes reflect that Plaintiff called in December 2009 because she was doing worse because  
23 of the stress of her daughter’s surgery.” AR 774. She was offered an appointment to come in and  
24 refused it. AR 774. She also cancelled her appointment in January. AR 774. Additionally, Plaintiff  
25 did not keep Dr. Middleton aware of medications prescribed by Dr. Yung, and Dr. Middleton informed  
26 Plaintiff he could not ethically continue to prescribe her medication if he was not her treating physician.  
27 AR 774-75. Additionally, Dr. Middleton noted that although Plaintiff had rheumatoid arthritis, he  
28 believed her symptoms were caused by fibromyalgia, and her arthritis was under good control. AR 775.

1       On September 14, 2010, Plaintiff saw Dr. Middleton for depression and requested a referral to a  
 2 psychiatrist. AR 760. The notes reflect that Plaintiff's depression was "not new." AR 760.

3       Plaintiff saw Dr. Yolanda Flores at SMA on November 28, 2011, and Plaintiff reported that  
 4 overall, she was doing well. AR 914.

5 **III. The ALJ's Decision.<sup>5</sup>**

6       The ALJ followed the five-step sequential evaluation process set forth at 20 C.F.R. §§ 404.1520  
 7 and 416.920 and issued an unfavorable decision on January 25, 2010. At step one, the ALJ found  
 8 Plaintiff had not engaged in SGA since May 31, 2008, the amended alleged onset date. AR 21.  
 9 At step two, the ALJ found Plaintiff had the following severe impairments: rheumatoid arthritis and  
 10 fibromyalgia. *Id.* He also found Plaintiff had the following non-severe impairments: depressive  
 11 disorder and pain disorder with psychological factors and a general medical condition. *Id.* In making  
 12 his findings at step two, the ALJ specifically considered all of Plaintiff's medically determinable  
 13 impairments, including her non-severe impairments of depressive disorder and pain disorder. *Id.* He  
 14 concluded that her non-severe impairments did not cause more than minimal limitation in Plaintiff's  
 15 ability to perform basic mental work activities and was, therefore, non-severe. *Id.*

16       The ALJ also specifically considered the Paragraph B criteria in Listing 12.00C of the Listing of  
 17 Impairments set forth at 20 C.F.R., Part 404, Subpart P, Appendix 1. AR 24. He concluded that the  
 18 greater weight of the evidence showed Plaintiff suffered mild limitation in activities of daily living,  
 19 mild limitation in social functioning, mild limitations in concentration, persistence of pace, and no  
 20 episodes of decompensation of extended duration. *Id.* In doing so, he found Plaintiff took care of her  
 21 baby with Down Syndrome, as well as two dogs and one cat. *Id.* He found she went out daily and  
 22 alone, drove a car, and shopped for groceries. *Id.* She could take care of household tasks, including  
 23 changing her daughter's diapers, feeding her daughter, preparing simple meals of cereal or sandwiches,  
 24 and folding laundry. *Id.* Plaintiff had not suffered any episodes of decompensation, and she maintained  
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27       <sup>5</sup>During the hearing, Plaintiff amended her alleged disability onset date to May 31, 2008. AR 21.  
 28 The ALJ found Plaintiff met the insured status requirements of the Social Security Act through  
 December 31, 2013. *Id.*

1 good relationships with her family and friends. *Id.* He also found Plaintiff had never sought treatment  
2 for her alleged depression or taken any medication to treat it. *Id.*

3 The ALJ considered the opinion of psychiatric consultative examiner Dr. Steven Goldstein, who  
4 examined Plaintiff in August 2008 and determined Plaintiff's mental impairments only minimally  
5 impaired her ability to function. *Id.* The ALJ gave "great weight" to Dr. Goldstein's opinion because it  
6 was consistent with the record as a whole. *Id.* The ALJ also considered the opinion of psychiatric  
7 consultative examiner Dr. John Paglini, who examined Plaintiff in November 2010 and also determined  
8 Plaintiff's mental impairments only minimally impaired her ability to function. *Id.* The ALJ gave  
9 "great weight" to Dr. Paglini's opinion because it was consistent with the record a whole. AR 25.

10 At step three, the ALJ concluded that Plaintiff did not have an impairment or combination of  
11 impairments that meets or medically equals one of the listed impairments in 20 C.F.R. Part 404,  
12 Subpart P, Appendix 1, including Listing 14.09. AR 25. He specifically discussed each subpart of  
13 Listing 14.09, which he found Plaintiff did not meet. *Id.*

14 After consideration of the entire record, the ALJ concluded that Plaintiff had the RFC to  
15 perform a full range of light work as defined in 20 C.F.R. 404.1567(b). AR 25. The ALJ found that the  
16 weight of the evidence in the AR revealed that although Plaintiff was unable to perform work at the  
17 light exertional level during specific periods of time due to her rheumatoid arthritis, such periods did  
18 not last for at least a continuous twelve-month period. AR 26. He found Plaintiff suffered flare-ups of  
19 her rheumatoid arthritis in December 2008, January 2009, July 2009, August 2009, December 2009,  
20 and February 2010. *Id.* Despite these flare-ups, the ALJ found that Plaintiff's treatment records from  
21 Dr. Christianne Yung, Plaintiff's treating physician, showed that before and after the flare-ups,  
22 Plaintiff's rheumatoid arthritis consistently improved. *Id.*

23 Additionally, the ALJ considered the opinion of orthopedic consultative examiner Dr. Alan  
24 Berman, who examined Plaintiff in October 2008 and found she was not disabled. AR 27. The ALJ  
25 gave "great weight" to Dr. Berman's opinion that Plaintiff had an RFC of light exertional level because  
26 it was consistent with the record as a whole. *Id.* Likewise, the ALJ considered the opinion of state  
27 agency physician Dr. J. R. Saphir, who opined in October 2008 that Plaintiff was "not disabled" and  
28 could perform light work. *Id.* The ALJ specifically observed that although Dr. Saphir was a non-

1 examining physician, his opinion did not deserve as much weight as an examining or treating physician,  
 2 but it did deserve some weight, "especially in a case like this in which there exist a number of other  
 3 reasons to reach similar conclusions (as explained throughout this decision)." *Id.*

4 The ALJ also considered treatment notes from Plaintiff's treating physician Dr. Yung. *Id.*  
 5 Specifically, the ALJ found that Plaintiff's inability to work was not Dr. Yung's opinion, but was  
 6 instead reported to Dr. Yung by Plaintiff herself. *Id.* The ALJ found Dr. Yung's treatment notes did  
 7 not reveal Dr. Yung placed or recommended any restrictions on Plaintiff's activities. *Id.* The ALJ,  
 8 therefore, gave Dr. Yung's statement that Plaintiff was unable to work little weight because it was  
 9 inconsistent with Dr. Yung's own treatment notes. *Id.*

10 The ALJ also found that Plaintiff's reported symptoms were disproportionate to the objective  
 11 findings of the medical record, inconsistent with the medical opinion evidence, exaggerated, not fully  
 12 credible, and Plaintiff's MMPI test results also suggested symptom exaggeration. AR 28-29. The ALJ  
 13 supported this finding with specific references to inconsistencies in the record. *Id.* Additionally, the  
 14 ALJ observed that Plaintiff reported generally the same symptoms before the amended onset date, when  
 15 she was working, strongly suggested her symptoms would not currently prevent work. AR 29. The  
 16 ALJ therefore concluded that Plaintiff's statements concerning the intensity, persistence, and limiting  
 17 effects of her symptoms were not credible to the extent they were inconsistent with the ALJ's RFC  
 18 assessment.

19 At step five, the ALJ found Plaintiff was capable of performing her PRW as a teacher's aide and  
 20 was not under a disability from May 31, 2008, through the date of the ALJ's decision.

21 **IV. The Parties' Positions.**

22 Plaintiff asserts that the ALJ erred in failing to include the mental limitation he found Plaintiff  
 23 suffered from in his assessment of Plaintiff's RFC and in the hypothetical he presented to the vocational  
 24 expert. Plaintiff contends this error is material given the skilled nature of Plaintiff's PRW as a teacher's  
 25 aide. Even a mild limitation in social functioning and concentration, persistence, and pace would  
 26 impact Plaintiff's ability to do her PRW of interacting with students, grading student work, and  
 27 maintaining order in the classroom. In support of her argument, Plaintiff relies on an unpublished  
 28 Ninth Circuit decision in *Hutton v. Astrue*, 491 Fed. Appx. 850 (9th Cir. 2012), where the Ninth Circuit

1 reversed because the ALJ failed to consider the claimant's mild post-traumatic stress disorder  
2 ("PTSD").

3 In response, the government asserts that Plaintiff misunderstands the use of the psychiatric  
4 technique described at 20 C.F.R. § 404.1520a. Namely, the government asserts the purpose of the  
5 regulation is to determine the severity of a claimant's condition, and if it is determined to be severe,  
6 then the regulation is used to determine whether a claimant meets or equals a Listing. Here, the  
7 government contends the ALJ properly concluded that because the greater weight of the evidence  
8 revealed Plaintiff had mild limitations in her activities of daily living; mild limitations in social  
9 functioning; mild limitations in maintaining concentration, pace, or persistence; and no episodes of  
10 decompensation of extended duration, her mental impairments were not severe. Therefore, pursuant to  
11 20 C.F.R. 404.1520a(d)(1), the ALJ assessed Plaintiff's RFC. The regulations require the ALJ to  
12 consider Plaintiff's mental limitations in fashioning the RFC; they do not require the ALJ to include  
13 them. Here, the ALJ considered Plaintiff's mild mental limitations.

14 Additionally, there was no vocational expert testimony at the hearing, and therefore, the ALJ did  
15 not err in presenting a hypothetical. Furthermore, Plaintiff's reliance on *Hutton* is misplaced because  
16 there, the ALJ did not consider the claimant's PTSD because the ALJ discounted the claimant's  
17 credibility in that regard. Here, the ALJ considered Plaintiff's mental impairments. He did not negate  
18 the existence of Plaintiff's non-severe mental impairment like the ALJ in *Hutton*. Additionally, the  
19 government contends that substantial evidence supports the ALJ's conclusion that Plaintiff could  
20 perform a full range of light work despite her mental limitations. Relying on *Pinto v. Massanari*, 249  
21 F.3d 840, 846 (9th Cir. 2001), the government asserts the ALJ properly concluded that Plaintiff's PRW  
22 did not exceed her RFC, and she could perform it.

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1        **V.     Analysis and Findings**

2        Reviewing the record as a whole, weighing both the evidence that supports and the evidence that  
 3        detracts from the ALJ's conclusion, the court finds the ALJ's decision is supported by substantial  
 4        evidence, and the ALJ did not commit legal error. Plaintiff argues the ALJ erred at step four of the  
 5        analysis in determining Plaintiff's RFC.<sup>6</sup> Relying on *Hutton v. Astrue*, 491 Fed. Appx. 850, Plaintiff  
 6        asserts that the ALJ should have performed a more detailed analysis of Plaintiff's mental impairments.  
 7        20 C.F.R. § 404.1545(a)(2) requires that an ALJ consider all limitations when assessing a claimant's  
 8        RFC, even if those limitations are found to be non-severe. *Id.* ("We will consider all of your medically  
 9        determinable impairments of which we are aware, including your medically determinable impairments  
 10        that are not 'severe' . . . when we assess your residual functional capacity.")

11        *Hutton* is an unpublished decision that is not binding precedent on this court.<sup>7</sup> There, the Ninth  
 12        Circuit found an ALJ erred by failing to include the claimant's PTSD in the assessment of the  
 13        claimant's RFC. At step two the ALJ determined the claimant's PTSD existed but was nonsevere  
 14        pursuant to 20 C.F.R. § 404.1520a(c)(3). The court observed that pursuant to 20 C.F.R. §  
 15        404.1545(a)(2), the ALJ was required to consider the PTSD in determining the claimant's RFC, but he  
 16        did not. *Id.* at 850-51. Instead, the ALJ discredited the claimant, his treating physicians' opinions and  
 17        the Veterans Administration's disability rating. *Id.* at 850. The court did not, however, base its reversal  
 18        on these actions by the ALJ. *Id.* Instead, the court took exception to the ALJ's mischaracterization of  
 19        the claimant's wife's testimony, finding that the claimant lacked credibility. *Id.* The ALJ found the  
 20        claimant's PTSD claims were "in great doubt" and excluded the claimant's PTSD from consideration.  
 21        *Id.* The Ninth Circuit held this was legal error.

22        Here, the ALJ specifically considered Plaintiff's non-severe mental impairments in evaluating  
 23        Plaintiff's RFC. In particular, he considered the opinion of consultative examiner Steven Goldstein,  
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25        <sup>6</sup>Plaintiff also argues the ALJ erred by failing to include Plaintiff's mental limitations in the  
 26        hypothetical to the vocational expert. No vocational expert testified at the administrative hearing. AR  
 27        37-64. Therefore, this argument is without merit.

28        <sup>7</sup>See generally Fed. R. App. Proc. 32.1.

1 who diagnosed pain disorder and depressive disorder, but opined Plaintiff could understand, remember  
2 and carry out simple and complex instructions and could maintain appropriate behavior with her co-  
3 workers, supervisors, and the public. AR 24. Additionally, the ALJ considered the opinions of Drs.  
4 Paglini and Yao, who diagnosed pain disorder and depressive disorder, and opined that Plaintiff's  
5 mental impairments only mildly impaired her ability to function. *Id.* The ALJ specifically noted at the  
6 conclusion of his step two analysis that his RFC assessment "reflects the degree of limitation the  
7 undersigned has found in the 'paragraph B' mental function analysis." AR 25. Although the ALJ did  
8 not extensively discuss Plaintiff's mental impairments at step four, he thoroughly discussed the  
9 evidence supporting his findings at step two and incorporated them by reference in his RFC analysis.  
10 An ALJ is required to discuss and evaluate evidence that supports his conclusion; he is not required to  
11 do so under any specific heading. *See Lewis v. Apfel*, 236 F.3d 503. 513 (9th Cir. 2001). The court  
12 finds the ALJ considered Plaintiff's mild mental limitations in his RFC analysis.

13 Additionally, the court finds that the ALJ properly found Plaintiff could perform her PRW as a  
14 teacher's aide. The ALJ properly reviewed Plaintiff's RFC and the physical and mental demands of the  
15 work she previously performed. *See* 20 C.F.R. §§ 404.1520(f), 416.920(f); *see also Berry v. Astrue*,  
16 622 F.3d 1228, 1231 (9th Cir. 2010). The ALJ determined Plaintiff had the RFC to perform a full range  
17 of light work, and he found that she could perform such work as it is customarily performed and as she  
18 actually performed it. AR 25-29. The ALJ's RFC finding specifically incorporated Plaintiff's mild  
19 limitations in mental functioning. AR 25. Plaintiff's argument that she is not able to interact with  
20 students, grade student work, or maintain order in the classroom is unsupported by any citation to the  
21 AR or any case law.

22 Furthermore, as the ALJ observed, Plaintiff's medical records show that her impairments were  
23 present at approximately the same level of severity prior to the amended alleged disability onset date.  
24 AR 29. Plaintiff reported generally the same symptoms and experienced the same flareups before the  
25 amended alleged onset date, yet she continued to work. *Id.* The ALJ found that the fact that the  
26 impairments did not prevent Plaintiff from working at the time "strongly suggests it would not currently  
27 prevent work." *Id.* Plaintiff testified that she left her former work in May 2008 to take medical leave  
28 for her pregnancy and not due to her impairments. Additionally, her treatment records do not show any

1 worsening or change in reported symptoms after that time. *Id.* As set forth above, the ALJ found  
2 Plaintiff's mild mental limitations were not sufficiently severe to limit her ability to work at  
3 the light exertional level, and the ALJ appropriately determined Plaintiff could perform her PRW as a  
4 teacher's aide.

5 **VI. Conclusion**

6 Judicial review of a decision to deny disability benefits is limited to determining whether the  
7 decision is based on substantial evidence reviewing the administrative record as a whole. If the record  
8 will support more than one rational interpretation, the court must defer to the Commissioner's  
9 interpretation. If the evidence can reasonably support either affirming or reversing the ALJ's decision,  
10 the court may not substitute its judgment for the ALJ's. *Flaten*, 44 F.3d at 1457. It is the ALJ's  
11 responsibility to make findings of fact, drawing reasonable inferences from the record as a whole, and  
12 to resolve conflicts in the evidence and differences of opinion. Having reviewed the Administrative  
13 Record as a whole, and weighing the evidence that supports and detracts from the Commissioner's  
14 conclusion, the court finds that the ALJ's decision is supported by substantial evidence under 42 U.S.C.  
15 § 405(g). For all of the foregoing reasons,

16 **IT IS RECOMMENDED:**

17 1. Plaintiff's Motion to Remand (Dkt. #24) be DENIED.  
18 2. The Commissioner's Cross-Motion to Affirm (Dkt. #27) be GRANTED.

19 Dated this 14th day of August, 2013.

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22 PEGGY A. TEEN  
23 UNITED STATES MAGISTRATE JUDGE  
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